United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7642

In The

UNITED STATES COURT OF APPEALS

For The Second Circuit

75-8076

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P/

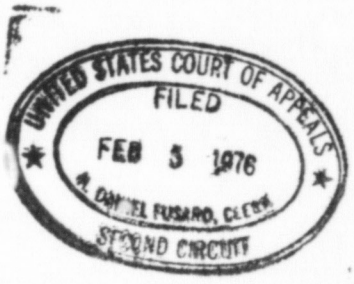
VICTOR O. PRINCIOTTI,

Plaintiff-Appellant,

-against-

MEDITERRANEAN MARINE LINES, INC.

Defendant-Appellee.



PLAINTIFF-APPELLANT'S REPLY BRIEF

3

Defendant's Appellee's brief goes into two matters, one, which has absolutely nothing to do with the basis for the appeal and,

Presenting a question which has nothing to do with appellant's claim of error.

ANSWERING POINT I

APPELLANT DOES NOT QUESTION THE CORRECTNESS OF ANY PRINCIPLES OF LAW SET FORTH IN POINT I

It is Appellant's position, that in light of the exclusion of Eli Weir's deposition, the plaintiff was denied a fair trial, as basic and material evidence amply sufficient to sustain appellant's position was wrongfully withheld from the Jury. A reading of Weir's deposition will demonstrate that such evidence would have been more than sufficient to sustain the plaintiff's burden of proof without which plaintiff's position was seriously prejudiced and his credibility subjected to unwarranted attack. The exclusion tended to put plaintiff in a straight jacket so that he could not defend his position without this testimony. The plaintiff was put in a position of having a Jury verdict against him, without having an opportunity to present all of the material and relevant facts.

ANSWERING POINT II

APPELLEE HAS CITED A NUMBER OF DECISIONS CLAIMING THAT THEY STAND FOR THE PRINCIPLE OF LAW WHICH JUST IS NOT SO.

None of the decisions cited authorized exclusion of testimony by a witness based on photographs which fairly and fully represent the condition as to the time of the accident. None of the cases cited by appellee hold for the position that prevents a witness, who is fully familiar with the condition, from testifying as to photographs which showed the condition as being a correct representation of the condition at the time of the accident. Weir saw the condition complained of and was entitled to describe it as to pictures taken of the condition as it existed at the time of the accident, irrespective of the fact that he was not present at the time of the accident. This does not make his knowledge too remote.

page 701

In the case of Weinstock v. United States, /231 F. 2d 699, the court stated:

> "To be "relevant" means to relate to the issue. To be "material" means to have probative weight, i.e., reasonably likely to influence the tribunal in making a determination required to be made."

This is contrary to the law as alleged by appellee in

page 491

the case of United States v. DeLucia, /256 F. 2d 487, (7th Cir., 1958) cert. denied, 358 U.S. 863 (1958) which states:

> ""Materiality", with reference to evidence, means the property of substantial importance and it has been said that evidence is material where it is relevant and goes to the substantial matters in dispute or has a legitimate or effective bearing on the decision of the same, while evidence is competent if it is fit for the purpose for which it is offered."

Weir's testimony meets the requirements set forth by Weinstock v. United States and United States vs. DeLucia supra.

In the case of International Shoe Mach. Corp. vs. United Shoe Mach. Corp. 315 F. 2d 449 (1st Cir., 1963) cert. denied, 375 U.S. 820 (1962) the court treats with illegal acts and proclivity towards similar wrongs. This has nothing to do with Weir's testimony.

In the case of Smith v. Spina, 477, F. 2d 1140 (3rd Cir. (1973) the court treats with question of relevancy and remoteness in an assault case but does not stand for authority to prevent a witness from testifying as to a condition with which he was fully familiar being the same as shown by pictures in evidence.

In the case of United States v. Maryland & Virginia Milk Pro. Ass'n. 20 F.R.D. 441, 442, (D.D.C., 1975), page 443 the courts stated:

> "The decision depends in large part on the issues."

Eli Weir's testimony was crucial on the question of preponderence of evidence and it was error for the court to exclude such important material and relevant testimony.

In the case of Vareltzis vs. Luchenbach Steamship Co. 258 F. 2d 78, 81 (2nd Cir., 1958) there was no evidence that the witness had any personal knowledge of the conditions complained of and no pictures were shown him as to the condition present at the time of the accident.

In the case of Fitzgerald v. United States Lines, Co.,

306 F. 2d 461, (2nd Cir., 1962); reversed on other grounds, 374 U.S. 16 (1962) dealth with the excluding of conversations and activities of the past, and not as to a present condition as in the instant case, as to which the witness had personal knowledge and which he described as being fairly represented by pictures in evidence.

In the case of Cardali v. A/S Glittre, et al., 350 F. 2d 271, 275, (2nd Cir., 1966) does not treat with exclusion of testimony. This was a matter wherein the court found on the facts in evidence that the plaintiff's testimony as to physical condition was not credible. This case had nothing to do with exclusion of testimony.

CONCLUSION

Appellee in its Point I, goes into discussions of principles of law which are not in dispute.

This is creating strawmen for the purpose of knocking them down, but does not seem to have any place in the brief.

Appellee in Point II argues as to the right of a Judge to exclude testimony under circumstances in nowise comparable t. the facts in this case. Mr. Weir's testimony was basic and amply sufficient to sustain the plaintiff's burden of proof. The pictures in evidence showing the condition which existed at the time of the accident being the same as Mr. Weir stated, was sufficient to entitle Appellant to the finding of proof by a witness who is fully familiar withthe defects of the ice machine.

Respectfully submitted,

Victor O. Princiotti

VICTOR O. PRINCIOTTI

Feb 5th 1976

On this day I
delivered a copy to Haight
Gardner & Poors.

Victor O Printup